



New Day at EPA

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Since the November presidential election, most trade journals have expressed the same or similar headlines: "The Joe Biden/Kamala Harris administration will elevate enforcement for violation of environmental rules and regulations." This may or may not be true, but there is a simple recipe for protecting industrial plants from increased scrutiny: plan now to perform environmental compliance audits and make the voluntary disclosure decision, if noncompliance is discovered.

Environmental Compliance Audit and Systems

Monitoring environmental compliance can take many forms. Environmental Protection Agency (EPA) policies identify two such programs: routine environmental compliance audits and the environmental compliance management system (CMS). Both require systematic discovery of environmental violations, and both can lead to protection against EPA enforcement.

Routine audits (typically by third parties or roving corporate audit teams) evaluate compliance with key environmental regulations at specific times and dates. To be successful, routine audits require top management support, need to be independent of operations personnel, and must document compliance findings using quality analysis/quality control procedures (51 Fed. Reg. 25009). Easy targets for non-compliance at any facility may include:

- Lack of complete records for monitoring bag house pressure ranges and scrubber flow meter readings or untimely stack tests;
- Obsolete hazardous waste contingency plans or lack of newly required Quick Reference Guides, open or undated hazardous waste containers, and lack of pictograms for satellite containers; and
- Violation of effluent limits for total Kjeldahl nitrogen, biological oxygen demand, chemical oxygen demand, or total suspended solids in the wastewater discharge or, worse, failure to prepare and implement benchmark monitoring and a storm water pollution prevention plan for the facility's storm water runoff

CMSs play a critical role as well. Unlike periodic routine audits, the CMS is an integrated environmental

management system that continually reviews and evaluates (daily) environmental compliance metrics. According to EPA, the environmental CMS is designed to "train, motivate, detect, and correct" environmental noncompliance on a day-to-day basis at the plant (65 Fed. Reg. 19621). It necessarily involves a deep dive into compliance through "internal investigations" and requires top-down involvement in environmental compliance decisions.

Whatever route a company takes, routine audits or the vigorous CMS will help if the new presidential administration elevates enforcement for environmental non-compliance.

EPA Voluntary Disclosure Policy Requirements

Where routine environmental compliance audits or the environmental CMS discovers environmental noncompliance, the facility must be prepared to act. Failure to respond in a timely manner may lead to knowing or willful violations because there is now a record of the violation.

From 1985 to 2018, EPA developed and refined guidance for facilities discovering unexpected environmental violations, known as the EPA "Incentives for Self-Policing: Discovery, Disclosure, Correction, and Preventions of Violations" ("self-policing policy"). While President Barack Obama's administration declined to recognize the self-policing policy except in rare circumstances, President Donald Trump's administration dusted the policy off and issued new guidance to "refresh" and expand the program.

Incentives reconstituted by Trump's EPA for self-reporting environmental violations are not inconsequential. The gravity portion of a penalty (as much as \$54,000 per day) is eliminated if discovery and reporting of a violation is the result of routine environmental audits or a qualifying CMS, while all other disclosures may reduce gravity fines by 75 percent. In both cases, the audits are protected from use by EPA, and no criminal referrals may follow. Put simply, the stated purpose of the self-policing policy is to encourage regulated entities to "voluntarily discover, promptly disclose, and expediently correct violations" (65 Fed. Reg. 19618).

To fall within the self-policing policy, EPA requires eight elements:

1. Disclosure must be "voluntary" and not the result of permit or regulatory requirements
2. Noncompliance must be reported within 21 days unless there is a "complex circumstance"
3. Discovery must be "independent" of third parties, such as notice by environmentalists or regulators
4. Violations must be corrected and the plant must "remedy any harm" caused by the violations within sixty days
5. Steps to "prevent recurrence" must be taken
6. The violation must not be a repeat of a similar or same violation within three years at that facility
7. Noncompliance must not cause "serious or actual harm" to the public or environment
8. The facility is required to cooperate and implement corrective action

If a company recently purchased a violating facility, the refreshed self-policing policy provides a break on certain provisions. The plant receives up to 45 days to disclose pre-purchase noncompliance, and air permit monitoring and recordkeeping requirements are considered "voluntary" even though they may be listed in the Title V Permit.

E-Disclosure System

All voluntary disclosures must be made electronically (e-disclosure) in accordance with the EPA "central data exchange," or CDX, system. The CDX offers immediate relief for certain violations.

Voluntary disclosure of failure to file annual Emergency Planning and Community Right-to-Know Act (EPCRA) reports are considered Tier I violations and are resolved promptly by the CDX system. Each Tier I report receives an "e-NOD," or electronic Notice of Determination, concluding the matter within just a few days. The facility must correct the EPCRA reports and certify compliance within 60 days. EPA intends to "spot-check" those voluntarily submitting Tier I violations for compliance with EPCRA requirements.

All other voluntarily disclosed non-compliance falls under Tier 2 of the e-disclosure program. Those submitting a Tier 2 e-disclosure receive an automated acknowledgement letter (AL), which is simply a record of receipt committing EPA to make a determination on enforcement within a prescribed time period. The letter may request further information before resolution of the case. The company may request more than 60 days to correct a Tier 2 violation.

Recommended Strategy: Three Step Process

Industry facing uncertain EPA rules and regulations should plan now to avoid a "bet-the-company" enforcement action by a Biden/Harris administration. The tried-and-true EPA self-policing policy may offer an opportunity to manage that risk. Whether it is routine audits or robust CMS, companies should perform internal investigations into environmental compliance within the first quarter 2021.

The following approach will allow facilities to successfully evaluate and disclose environmental violations.

Step 1: Retain counsel to oversee development and implementation of any environmental compliance audit or CMS in order to provide maximum protection from disclosure of the audit results.

Step 2: Evaluate the need for voluntary disclosure of environmental violations promptly after completion of the audit or CMS and timely disclose, thereby managing risks of enforcement.

Step 3: Be certain the voluntary disclosure satisfies all eight elements of the self-policing policy prior to reporting, then follow-through on required corrective measures within the 60-day timeline.

EPA's Audit Policy: Frequently Asked Questions (January 2021)

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